Supreme Court, U.S.
FILED
FEB 6 1995
CLERK OF THE COURT

No. 94-1232

In The

Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK,

Petitioner,

vs.

THE ESTATE OF JOAN POPP,

Respondent.

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH A. CARLIN, Esq.
Counsel of Record
14600 Detroit Avenue
Suite 1150
Lakewood, Ohio 44107
(216) 221-2323

Attorney for Respondent
Estate of Joan Popp

LOCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Is the trial court's Judgment against the petitioner for damages in a specified dollar amount and a 10% monetary penalty thereon pursuant to § 2109.52 of the Ohio Revised Code the equivalent of a felony conviction under Ohio law so as to entitle it (Ohio Savings Bank) under the U.S. constitution to:

1. A mandatory jury trial required by the Sixth Amendment therein; and/or

2. Avoidance of any determination of liability under R.C. 2109.52 pursuant to the Fourteenth Amendment herein unless the respondent can prove that it (petitioner) acted with knowledge and/or a culpable mental state?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 6

REASONS FOR REJECTION 8

Since Sections 2109.50 and 2109.52 of the Ohio Revised Code as applied against OSB in this case are statutes which govern a civil proceeding with a financial or pecuniary penalty rather than a quasi criminal or criminal proceeding, OSB has no United States constitutional issue for this honorable Court's review 8

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Bloom v. State of Illinois, 391 U.S. 194, 88 S.Ct. 1477 (1968) 17

Hicks v. Feiock, 485 U.S. 624, 108 S.Ct. 1423 (1988) ..14, 17

In Re: Black, 145 Ohio St. 405 (1945) 10

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968) 14

In Re: Howard, 79 Ohio App. 203 (Franklin County Court of Appeals, 1947) 9

Kennedy v. Mendoza-Martinez, 372 U.S. 144, S.Ct. 554 (1963) 16

Linquist v. Hayes, Administrator, 22 Ohio Opp. 141 (Lucas County Court of Appeals, 1926) 9

Liparota v. United States, 471 U.S., 419, 105 S.Ct. 2084 (1985) 14

Missouri Pacific Ry. v. Tucker, 230 U.S. 340, 33 S.Ct. 961 (1913) 16

Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240 (1952) 14

Penfield Co. v. SEC, 330 U.S. 585 (1947)..... 14

Southwestern Tel. Co. v. Danahar, 238 U.S. 482, 35 S.Ct. 886 (1915)..... 15

State v. Beasley, 14 Ohio St.3d 175 (1984) 12

State v. Hill, 72 Ohio App.3d 233, 594 N.E.2d 164 (Cuyahoga County Court of Appeals, 1991) 12

U.S. v. Garcia, 751 F.2d 1033 (9th Cir. 1985) 14

U.S. v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. International Minerals & Chem. Corp., 402 U.S. 558, 91 S.Ct. 1697 (1971) 14

United States v. United States Gypsum, 438 U.S. 422, 98 S.Ct. 2864 (1978) 15

Wozniak v. Wozniak, 90 Ohio App.3d 400 (Court of Appeals of Ohio, Summit County, 1991) 9

STATUTES AND RULES:

Ohio Revised Code Section 1343.03(A) 11

Ohio Revised Code Section 2109.50 ..... *passim*

Ohio Revised Code Section 2109.52 ..... *passim*

Ohio Revised Code Section 2929.11(B)(5) 12

Ohio Revised Code Section 2929.11(C)(2) 12

Ohio Revised Code Section 2929.14(B) 12

OTHER:

Sixth Amendment, U.S. Constitution 2

Fourteenth Amendment, U.S. Constitution 2

Ohio Rules of Civil Procedure, Rule 56(C) 19, 20

Rules of the United States Supreme Court, Rule 10(1) 2

No. 94-1232

In The

Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK,

Petitioner,

vs.

THE ESTATE OF JOAN POPP,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Hugh A. Carlin, Attorney for the Estate of Joan Popp, hereinafter referred to as "respondent" respectfully submits this Memorandum in Opposition to the Petition for Writ of Certiorari previously filed by petitioner herein, Ohio Savings Bank, hereinafter referred as "OSB".

OPINIONS BELOW

The opinions in question are set forth on pp. 1 and 2, and Appendixes ("App.") 1, 2, and 21 of OSB's previously filed petition with this honorable Court.

JURISDICTIONAL STATEMENT

OSB's previously filed petition with this Court fails to set forth any substantial United States constitutional issue so as to provide it (this Court) with any reason to exercise its discretion to review the aforementioned Ohio Courts' Judgments within the meaning of Rule 10(1), *Rules of the Supreme Court.*

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Constitution, Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

App. 1.

The Fourteenth Amendment to the U.S. Constitution provides in part that:

> "*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . "

App. 2.

Section 2109.50 of the Ohio Revised Code provides:

"Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint. Where necessary such citation, attachment or warrant may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered. The officer to whom such process is delivered shall be liable for negligence in its service or return in like manner as sheriffs are liable for negligence in not serving or returning a capias issued upon an indictment. Before issuing an extra-county citation, attachment or warrant, the probate judgment may require the complainant to post security with the probate court in such amount and in such form as the probate judge shall find acceptable in order to

cover the costs of the proceeding under this section, including in such costs a reasonable allowance for the travelling expenses of the person or persons against whom an extra-county citation, attachment or warrant is to be issued. Such security may be in the form of a bond, the amount, terms, conditions and sureties of which shall be subject to the approval of the probate judge.

The probate court may initiate proceedings on its own motion.

The probate court shall forthwith proceed to hear and determine the matter.

The examinations, including questions and answers, shall be reduced to writing, signed by the party examined, and filed in the probate court.

If required by either party, the probate court shall swear such witnesses as may be offered by either party touching the matter of such complaint and cause the examination of every such witness, including questions and answers, to be reduced to writing, signed by the witness, and filed in the probate court.

All costs of such proceedings, including the reasonable travelling expenses of a person against whom an extra-county citation, attachment or warrant is issued, shall be assessed against and paid by the party making the complaint, except as provided by Section 2109.52 of the Revised Code."

App. 3.

Section 2109.52 of the Ohio Revised Code provides:

"When passing on a complaint made under Section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, chattels, or choses in action of the trust estate. *If such person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind.* The probate court may issue a citation into any county in this state, which citation shall be served and returned as provided in Section 2109.50, requiring any person to appear before it who claims any interest in the assets alleged to have been concealed, embezzled, conveyed, or held in possession and at such hearing may hear and determine questions of title relating to such assets. *In all cases, except when the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten percent penalty and all costs of such proceeding or complaint;* except that such judgment shall be reduced to the extent of the value of any thing specifically restored or returned in kind as provided in this Section.

If the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the state against him for such amount or value, together with penalty and costs as provided in this Section." (Emphasis supplied)

App. 4.

STATEMENT OF THE CASE

The pertinent facts of the case are as follows:

Joan Popp died on January 30, 1991. On January 30, 1991, there existed a savings account solely in the name of Joan Popp at Ohio Savings Bank with a $55,505.13 balance on that date (App. 6, p. 9).

On February 13, 1992, said savings account was reduced to a zero balance by OSB's payment to William A. Hamann, Administrator of $55,833.86 (App. 5 and 6, p. 11), based on the documents he presented to them. Those documents included a forged Cuyahoga County Probate Court Letters of Administration in his name, and a forged Ohio Estate Tax Release (App. 6, pp. 10 and 12, respectively).

As of February 13, 1991, there was no lawfully appointed Administrator of the Estate of Joan Popp, Deceased.

The aforementioned forged Letters of Administration used by Hamann to withdraw the entire balance of Joan Popp's savings account from OSB was irregular on its face because in the printed portion it referred to: "I,

Francis J. Talty, Judge of the Probate Court within and for said County," however, the forged signature is that of John J. Donnelly, Probate Judge (App. 6, p. 10).

On or about July 23, 1991, the Administrator of the Estate of Joan Popp filed a Complaint for the Concealment, Embezzlement or Conveying Away Assets pursuant to the authority of R.C. 2109.50 in the Cuyahoga County Probate Court against various defendants including Hamann and OSB. The Administrator's Complaint alleged that OSB concealed, embezzled or conveyed away or is or was in possession of moneys, chattels or choses of action of the Popp estate.

In March, 1992, OSB filed a Complaint in Cuyahoga County Common Pleas Court, Case No. 228027, entitled *OSB v. Transohio Savings Bank, William A. Hamann, Jr., Marvin P. Schatz, and Virginia Popp Durma.*

On May 28, 1993, OSB took the deposition of Hamann in the aforementioned related civil action removed to U.S. District Court, Case No. 1:92CV 2025. The pertinent portions of such deposition were:

> (a) The seal on the forged Letters of Administration was altered to limit the notary seal to include the words "State of Ohio, Cuyahoga County" (App. 7, p. 22).
>
> (b) With respect to the forged Ohio Estate Tax Release, it was used for a Cuyahoga County resident but did not have the stamp used for tax releases from that county but only had a signature line or block (App. 7, pp. 22-24, App. 6, p. 12).

In addition, counsel for substituted defendant, Resolution Trust Corporation, obtained by discovery from

OSB in the U.S. District Court case, its internal operations manual regarding the procedure to be followed in closing various accounts including those of deceased depositors (See Appendix 8, p. 30 entitled, *"III Converting, Transferring and Closing Procedures for Decedent Account, Sec(a)(5)"*.)

On November 3, 1992, the Cuyahoga County Probate Court rendered its judgment in favor of appellee on its R.C. 2109.50 Complaint against OSB in the principal amount of $55,833.86 and the 10% penalty thereon required by R.C. 2109.52.

On or about December 30, 1992, the Cuyahoga County Probate Court awarded the undersigned attorney fees totalling $33,000 (computed at the rate of $125 per hour) of which amount $12,750 was attributable solely to the commencement and prosecution of the aforementioned R.C. 2109.50 *et. seq.* proceeding against OSB through that date.

The Eighth District Court of Appeals, Case No. 64718, App. 2; OSB's Petition for Writ of Certiorari, on September 21, 1994, the Supreme Court of Ohio, Case No. 94-1253 rendered its Judgment Entry wherein it declined jurisdiction to hear OSB's appeal from the Eighth District Court of Appeals Judgment dated April 18, 1993.

REASONS FOR REJECTION

Since Sections 2109.50 and 2109.52 of the Ohio Revised Code as applied against OSB in this case are statutes which govern a civil proceeding with a financial or pecuniary penalty rather than a quasi criminal or

criminal proceeding, OSB has no United States constitutional issue for this honorable Court's review.

R.C. 2109.50 and .52 have been held to constitute a civil proceeding, namely for conversion with a financial penalty, *Wozniak v. Wozniak*, 90 Ohio App.3d 400 (Court of Appeals of Ohio, Summit County, 1993); *In Re Howard*, 79 Ohio App. 203 (Franklin County Court of Appeals, 1947); *Linquist v. Hayes, Administrator*, 22 Ohio App. 141 (Lucas County Court of Appeals, 1926). Page 407 of *Wozniak, supra*, described the nature of the inquiry under R.C. 2109.50 as follows:

> "The inquiry under R.C. 2109.50 focuses on the ownership of the asset and whether possession of the asset is being impermissibly concealed or withheld from the estate. Thus, a plaintiff has stated an actionable cause under R.C. 2109.50 if he alleges that the asset is the exclusive property of the estate and that the defendant has unauthorized possession of the asset or in some way has impermissibly disposed of it. See *Fecteau*, 171 Ohio St. at 125, 12 O.O.2d at 141, 167 N.E.2d at 893."

Pages 411 and 412 of *Wozniak, supra*, described the nature of an action under R.C. 2109.50 as civil, namely for conversion with the complainant's accompanying rights to recover pre and/or post judgment interest as follows:

> "In a civil action, the recovery of prejudgment interest is afforded litigants under both the common law and the statutory provision of R.C. 1343.03(C). *Moore v. Univ. of Cincinnati Hosp.* (1990), 67 Ohio App.3d 152, 154, 586 N.E.2d 213, 214. Generally, though, Ohio common law does not allow prejudgment interest in civil actions

based on tortious conduct. *Id.; Cleveland Ry. Co. v. Williams* (1926), 115 Ohio St., 584, 155 N.E. 133, syllabus. Some exceptions to this general rule exist, in particular, actions for conversion of personal property. *Lyle v. Durham* (1984), 16 Ohio App.3d 1, 3, 16 OBR 1, 3, 473 N.E.2d 1216, 1218; *Booth v. Cincinnati Finance Co.* (1923), 19 Ohio. App. 130, 135, aff'd (1924), 111 Ohio St. 361, 145 N.E. 543; *Morris v. Pearl Street Auction Co.* (1939), 61 Ohio App. 452, 15 O.O. 283, 22 N.E.2d 740."

The sole legislative purpose of an Ohio Revised Code 2109.50 proceeding is to provide a speedy and effective way of discovering moneys, chattels or choses in action belonging to a trust estate and of securing their return for administration, *In Re Black* 145 Ohio St. 405 (1945), and *Wozniak, supra*. Compare this statutory purpose to that of a solely criminal proceeding which is to determine whether the defendant has violated a rule of conduct required by society and to punish him or it accordingly.

In support of its previously filed Writ of Certiorari, OSB primarily relies on the premise that the 10% penalty under R.C. 2109.52 made its adjudication of liability thereunder a felony conviction by the trial court. OSB's reliance on this premise is misplaced for any or all of the following reasons:

1. This 10% financial penalty is not punitive in nature but is compensatory at least to the extent that it at least partially reimburses the complainant for his expenses for the commencement and completion of proceedings under R.C. 2109.50, *et. seq.* The language of R.C. 2109.50 and .52 clearly demonstrates that they are self-

contained statutory provisions which are silent as to compensation of a prevailing complainant for any expenses of this litigation other than court costs. As applied to this case, the Popp estate legal expenses through trial were at 2.5 times the $5,583.86 (10% statutory penalty) assessed against OSB. It is estimated that through the completion of this brief's preparation (based on the Probate Court allowed hourly rate of $125), the Popp estate legal expenses will be at least four times the $5,583.86 statutory penalty assessed against OSB by the trial court.

2. Sections 2109.50 and .52 of the Ohio Revised Code make no provision for the award of any interest to a successful complainant. Therefore, the 10% penalty under the latter statutory provision is the equivalent to the 10% interest rate applicable to a plaintiff judgment in a civil proceeding required by § 1343.03(A) of the Ohio Revised Code.

OSB's contention that R.C. 2109.52 could result in a 10% statutory penalty totalling an astronomical fixed amount in dollars such as one million dollars should be rejected and ignored by this Court in this case because: (1) it has absolutely nothing to do with the actual statutory financial penalty required to be assessed against petitioner under this statutory provision; and (2) this financial penalty is the functional equivalent to the 10% interest rate required for a plaintiff judgment in an Ohio Civil proceeding.

OSB argues that the 10% statutory penalty assessed against it by the trial court is the equivalent of either a second degree felony conviction or at least the fine therefor. This contention ignores and fails to take into account

Ohio law as to the mandatory penalties applicable to a second degree felony conviction. Section 2929.11(B)(5) of the Ohio Revised Code provides as follows:

> "Except as provided in Division D of this Section or Sections 2329.71 and 2329.72 and Chapter 2925 of the Revised Code, *terms of imprisonment for a felony shall be imposed as follows*:
>
> *(5) for a felony of the second degree, the minimum term shall be two, three, four or five years, and the maximum term shall be fifteen years.*" (Emphasis provided)

Section 2929.11(C)(2) of the Ohio Revised Code provides that the maximum fine for a second degree felony shall not exceed $7,500.

Section 2929.14(B) of the Ohio Revised Code limits the sentencing court's authority in a criminal proceeding to impose a fine in a citation to imprisonment for a felony conviction as follows:

> "(B) *The court shall not impose a fine in addition to imprisonment for a felony unless a fine is specifically adapted to deterrence of the offense or correction of the offender,* or the offense was committed with the purpose of establishing, maintaining, or facilitating an activity of a criminal syndicate, as defined in § 2923.04 of the Revised Code, or the offense was committed for hire or purpose of gain." (Emphasis supplied)

At least two Ohio cases have held that a fine without imprisonment of the defendant (whether conditionally suspended and/or probationable) renders that conviction void, *State v. Beasley*, 14 Ohio St.3d 175 (1984), and *State v.*

Hill, 72 Ohio App.3d 233, 594 N.E.2d 164 (Cuyahoga County Court of Appeals, 1991).

R.C. 2109.52, however, makes no provision for the imprisonment of any defendant or respondent adjudged to be guilty thereunder or under R.C. 2109.50. Therefore, in the absence of any proof by OSB that the Ohio legislature intended to enact a statute which would be void on its face for requiring a criminal conviction without any mandatory, conditional or unconditional imprisonment of the defendant, the 10% penalty referred to above should not make R.C. 2109.52 a wholly criminal statute.

In addition, this aforementioned mandatory-fixed 10% penalty does not meet any of the following criteria set forth in R.C. 2929.14(B) for imposing a fine in addition to imprisonment for a felony conviction: (1) that the fine be specifically adapted to the deterrence of any offense described in R.C. 2109.50 and .52; (2) that it (the fine) be specifically adapted to the correction of the offender, namely OSB in this case. That is, economic/business decisions and criteria, not the $5,583.38 mandatory financial penalty from this case will govern OSB's future conduct regarding the closing of a customer's bank account after his or her death.

None of the cases cited in OSB's Petition for Writ of Certiorari, namely pp. 8-29 inclusive, are appropriate for this Court's determination of whether R.C. 2109.52 as applied to it by the trial court in this case deprived it of its Fourteenth Amendment right to due process and/or equal protection under the law or its Sixth Amendment right to trial by jury.

Some of OSB's aforementioned cited cases fall into the following categories distinguishable from the 10% mandatory penalty involved in R.C. 2109.52:

1. The commission of a crime against and properly involving imprisonment, fine or both for conviction, *Morisette v. United States*, 342 U.S. 246, 72 S.Ct. 240 (1952); *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084 (1985); *U.S. v. Halper*, 490 U.S. 435, 109 S. CT. 1892 (1989); *U.S. v. Garcia*, 751 F.2d 1033 (9th Cir. 1985).

2. The commission of a crime against a person involving imprisonment, fine or both, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968).

3. Violation of a prior court order involving some form of imprisonment without a fine *Hicks v. Feiock*, 485 U.S. 624, 108 S. CT. 1423 (1988); *Penfield Co. v. SEC*, 330 U.S. 585 (1947).

In OSB's cited case of *Bloom v. State of Illinois*, 391 U.S. 194, 88 S.Ct. 1477 (1968), the defendant was accused of criminal contempt for presenting for probate a false/fraudulent will prepared after decedent died and was sentenced to jail under a statute with no stated minimum or maximum confinement period and with no fine. There is no comparison between that case and the case at bar which involved an adjudication of guilty for monetary damages and 10% penalty thereon but no imprisonment.

In OSB's cited case of *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 91 S.Ct. 1697 (1971), the defendant was charged with violation of a statute which prohibited the shipment of corrosive liquids in interstate commerce without so labeling them. There is no

comparison between that case which involves an act dangerous to public safety and the case at bar, which involved a transfer of a decedent's bank account balance to a person not legally entitled to receive it.

In OSB's cited case of *United States v. United States Gypsum*, 438, U.S. 422, 98 S.Ct. 2864 (1978), the defendant was charged with conspiring with competitors to keep prices down in restraint of trade. In that case, it was not always apparent whether the act in question was economically justifiable or in restraint of trade until after it occurred. Contrast that situation with this case where OSB transferred a decedent's bank account to a person not legally entitled or authorized to receive it based on documents irregular on their face and contrary to their own internal rules, regulations and procedures required to close a deceased depositor's account at that financial institution.

In OSB's cited case of *Southwestern Tel. Co. v. Danahar*, 238 U.S. 482, 35 S.Ct. 886 (1915), a statutory penalty was involved at $100 per day for 63 days due to the defendant telephone company's failure to provide telephone service to a previously delinquent bill paying customer unless and until she provided a deposit. In that case, this Court found that the regulations which the defendant was enforcing were reasonable due to the prohibitive expense it would otherwise incur to collect its delinquent telephone bills and that the statutory penalty of $6,300 as compared to the approximately $10 telephone bill involved was disproportionate to the actual financial loss it caused the customer by enforcement of those regulations. Contrast that situation to the case at bar where

OSB's violation of R.C. 2109.52 caused respondent financial loss at least two to four times the amount of the 10% statutory penalty in question and the nominal time spent and expense incurred if upon seeing documents irregular on their face, it called the Probate Court to confirm whether Hamann was the Popp Estate Administrator.

OSB's cited case of *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 33 S.Ct. 961 (1913), this Court fixed mandatory financial penalty in question was $500 as compared to the actual defendant's shipment overcharge of $3.02. That situation is totally unlike the assessment of the 10% penalty against OSB in the case at bar which is less than one-fourth of the respondent's costs in prosecution or proceedings under R.C. 2109.50 and .52 including all Appellate Court, Ohio Supreme Court, and U.S. Supreme Court proceedings to date.

OSB's cited case of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963), defendants were charged with fleeing the U.S. to avoid military service, the penalty for which was loss of U.S. citizenship. Contrast the potential loss of liberty in terms of loss of freedom to return to the U.S. (and in the case of one of the defendants involved, his potential of becoming a stateless person), if the defendants were found guilty in that case to the 10% penalty involved in this case which is a small fraction of the respondent's total financial losses including litigation expense caused by the petitioner.

Page 13 of OSB's Petition for Writ of Certiorari contends that both the amount of the 10% penalty in question and its mandatory penalty renders it solely criminal in

nature. This contention, however, ignores the basic characteristics set forth in *Hicks v. Feiock, supra,* which differentiate between civil and criminal contempt proceedings. In that case, this Court set forth the characteristics of a civil contempt proceeding as including the following: (1) Punishment must be remedial and inure for the complainant's benefit; and (2) when the punishment involves a fine, it is paid to the complainant or can be avoided by performing the act required by the prior court order.

In *Hicks v. Feiock, supra,* this Court set forth the characteristics of a criminal contempt proceeding as including the following: (1) Punishment is rendered to show the court's authority with respect to the underlying proceeding wherein the contemptuous conduct occurred; and (2) where the punishment involves a fine, it is required to be paid to the court.

R.C. 2109.50 and .52 do not involve either civil or criminal contempt proceeding because none of the prohibited conduct described therein involves any violation of a prior court order. The 10% monetary penalty in R.C. 2109.52, however, involves both of the characteristics of civil contempt described above, namely remedial punishment which is for the benefit of the complainant, namely payment of the monetary assessment involved directly the Popp estate as the complainant rather than the trial court.

This 10% penalty, however, does not involve any of the characteristics of a criminal contempt proceeding enumerated above since it is not punishment for the trial court to show its authority after one or more of its prior orders were violated by the defendant and since it is not

paid to the court when the complainant is the fiduciary of a victimized trust, estate or guardianship.

OSB will not benefit from the possible remand of the respondent's complaint to the Cuyahoga County Probate Court for further proceedings based on any alleged Fourteenth Amendment right to avoidance of Judgment under 2109.52 without proof that it acted with knowledge and/or a culpable mental state because:

1. It permitted the transfer of Joan Popp's funds on deposit after her death to a person not authorized to receive them in reliance on certain documents which were irregular on their face; namely: (a) that forged Letters of Administration which had typed in the name of one Probate Judge but with the purported signature of a second Probate Judge, App. 6, p. 10; and (b) the forged Letters of Administration also had a partial seal which was not from or by the Probate Court, see the portion of Hamann's deposition set forth at App. 7, p. 21.

2. It permitted the transfer of Joan Popp's funds on deposit after her death to a person not authorized to receive them in a manner contrary to its own written internal manual/procedure for doing so, (App. 8, p. 30). This regulation/written procedure required that when a deceased customer's account was to be closed, the check must be made payable to "The Estate of (decedent's name)" or to "(name of fiduciary), (title) of the Estate of (decedent's name)" (i.e., William A. Hamann, Administrator of the Estate of Joan Popp, Deceased). In this case, however, the check to reduce the Popp account to a zero balance issued by OSB after her death was made payable

to "William A. Hamann, Administrator", (App. 5, App. 6, p. 11).

3. It also permitted the transfer of Joan Popp's funds to a person not authorized to receive them in reliance on an Ohio Estate Tax Release which was not authorized in the generally accepted/customary manner, namely with a stamp from the Cuyahoga County Auditor (as the local agent for the Ohio Department of Taxation, Estate Tax) rather than the signature line actually used, (App. 6, p. 12, and App. 7, pp. 22-24).

OSB will not benefit from the possible remand of respondent's complaint to the trial court for further proceedings because of an alleged violation of its Sixth Amendment and/or Ohio Statutory right to a jury trial because: (1) it previously waived its right to a jury trial by conceding that respondent's complaint against it was a civil proceeding when it filed in December, 1992, a Motion to Dismiss this Complaint and/or for Summary Judgment. OSB cannot have it both ways, namely to initially treat the complaint as a civil proceeding by filing a Motion for Summary judgment but thereafter contend that the proceeding was criminal or quasi-criminal, only after losing that Motion; and (2) as a civil proceeding, respondent was properly granted Motion for Summary Judgment by the trial court on its complaint when it satisfied the requirements to do so set forth in O.R.C.P., Rule 56(C). Such requirements were that there be no genuine issues as to the material facts and that the movent be entitled to judgment as a matter of law.

CONCLUSION

For the foregoing reasons, respondent concludes as follows:

1. That the trial court's rendering judgment against OSB pursuant to R.C. 2109.52 for $55,833.81 and 10% penalty thereon did not deny it due process of law, within the meaning of the Fourteenth Amendment to the U.S. Constitution merely because there was no proof before such judgment that it acted knowingly and/or with criminal intent.

2. That the rendering of this judgment was not prejudicial to OSB since even with a remand to the trial court, the existence of knowledge by OSB that it transferred the proceeds of the Popp account a person not authorized to receive them could be proven at that time.

3. That the trial court's rendering judgment against OSB on Summary Judgment did not deny its constitutional and/or statutory right to a jury trial since all of the summary judgment requirements set forth in O.R.C.P., Rule 56(C) were satisfied.

Respectfully submitted,

HUGH A. CARLIN (0010723)
Counsel of Record
14600 Detroit Avenue #1150
Lakewood, Ohio 44107
(216) 221-2323

Attorney for Respondent

APPENDIX 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Constitution, Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

APPENDIX 2

The Fourteenth Amendment to the U.S. Constitution provides in part that:

> "*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . "

APPENDIX 3

Section 2109.50 of the Ohio Revised Code provides:

"Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint. Where necessary such citation, attachment or warrant may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered. The officer to whom such process is delivered shall be liable for negligence in its service or return in like manner as sheriffs are liable for negligence in not serving or returning a capias issued upon an indictment. Before issuing an extra-county citation, attachment or warrant, the probate judgment may require the complainant to post security with the probate court in such amount and in such form as the probate judge shall find acceptable in order to cover the costs of the proceeding under this section, including in such costs a reasonable allowance for the travelling expenses of the person or persons against whom an extra-county

citation, attachment or warrant is to be issued. Such security may be in the form of a bond, the amount, terms, conditions and sureties of which shall be subject to the approval of the probate judge.

The probate court may initiate proceedings on its own motion.

The probate court shall forthwith proceed to hear and determine the matter.

The examinations, including questions and answers, shall be reduced to writing, signed by the party examined, and filed in the probate court.

If required by either party, the probate court shall swear such witnesses as may be offered by either party touching the matter of such complaint and cause the examination of every such witness, including questions and answers, to be reduced to writing, signed by the witness, and filed in the probate court.

All costs of such proceedings, including the reasonable travelling expenses of a person against whom an extra-county citation, attachment or warrant is issued, shall be assessed against and paid by the party making the complaint, except as provided by Section 2109.52 of the Revised Code."

APPENDIX 4

Section 2109.52 of the Ohio Revised Code provides:

"When passing on a complaint made under Section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, chattels, or choses in action of the trust estate. *If such person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind.* The probate court may issue a citation into any county in this state, which citation shall be served and returned as provided in Section 2109.50, requiring any person to appear before it who claims any interest in the assets alleged to have been concealed, embezzled, conveyed, or held in possession and at such hearing may hear and determine questions of title relating to such assets. *In all cases, except when the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten percent penalty and all costs of such proceeding or complaint;* except that such judgment shall be reduced to the extent of the value of any thing specifically

restored or returned in kind as provided in this Section.

If the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the state against him for such amount or value, together with penalty and costs as provided in this Section." (Emphasis supplied)

APPENDIX 5

05 833407

OHIO SAVINGS BANK
1801 EAST NINTH STREET CLEVELAND, OHIO 44114

OFFICIAL CHECK
TWO SIGNATURES REQUIRED WHEN OVER $5,000.00

FEB 13 91

PLAINTIFF'S EXHIBIT A

PAY TO THE ORDER OF WILLIAM A. HAMANN, ADMINISTRATOR $55,833.86

$55,833.86

TO CLOSE ACCOUNT 816-00-06400 02-13-91 THE OHIO SAVINGS BANK

02-13-91 AUTHORIZED SIGNATURE 01001395

"833407" :0640009101: 10010 157" 0305 "0005583386"

PAY ANY BANK
FRB CLEVELAND OH10-0001-M
320901835 02-13-91

TRANSOHIO 02-13-91

01001395

012450020

16-683
196

APPENDIX 6

OHIO SAVINGS BANK

May 10, 1991

Alan G. Gelbman, Esq.
2000 Standard Building
1370 Ontario Avenue
Cleveland, OH 44113

Re: Estate of Joan E. Popp
vs. William A. Hamann, Jr., et al.

Dear Mr. Gelbman:

Pursuant to the subpoena issued to Ohio Savings Bank enclosed please find a copy of the savings history for the year 1991 along with a copy of the withdrawal ticket closing the account, appointment papers, tax release, and the front and back of the check issued. The original documents are with Mr. Ramsey of the FBI.

Should you require any further information please feel free to contact us.

Very truly yours,

/s/ Ruth Michaels
Ruth Michaels
Legal Dept.

16-0006400	DO	021391	021391	D	CLOSED			328.73	.00	51,304.24		021391	D60189	D-NONE	
										CLOSEOUT INT				.00	
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			1,503.12
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			658.28
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			666.48
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			674.79
16-0006400						HIST-D	021391	TLR 05-000021	BAL	55,505.13	TC	B			698.22
16-0006400						HIST-1	021391	TLR 05-000021	BAL	55,833.86	TC	940			328.73
16-0006400						HIST-D	021391	TLR 05-000021	BAL	.00	TC	910			55,833.86
16-0006400															
16-0006400						HIST-D	021391	TLR 05-000021	BAL	.00	TC	910			

IN THE PROBATE COURT
Division of the Court of Common Pleas

1023 No. 1024992

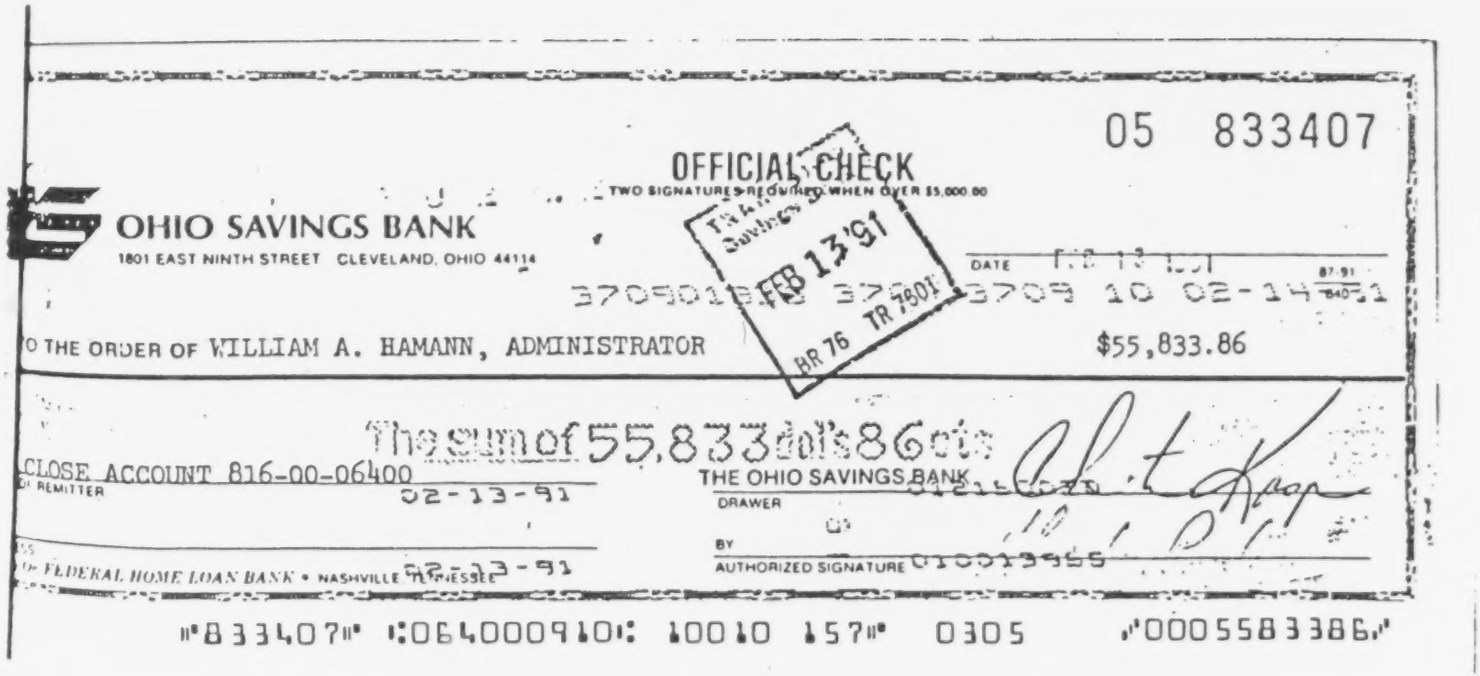
STATE OF OHIO)
) SS.
Cuyahoga County)

I, FRANCIS J. TALTY, Judge of the Probate Court and for said County, in the State aforesaid, do hereby certify and make known, that on 12th day of February one thousand nine hundred and ninety-one of Administration Of Estate of Joan Popp aka Joan E. Popp deceased, were granted William A. Hamann, Jr., Administrator

The same are now in full force and effect.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Probate Court, at Cleveland, Ohio, in said County, this 12th day of February, 1991.

/s/ John J. Donnelly
Probate Judge
By: /s/ M.M. Meyer
Deputy Clerk



05 833407

OFFICIAL CHECK

TWO SIGNATURES REQUIRED WHEN OVER $5,000.00

OHIO SAVINGS BANK

1801 EAST NINTH STREET CLEVELAND, OHIO 44114

FEB 13'91

DATE

3709 10 02-14

PAY TO THE ORDER OF WILLIAM A. HAMANN, ADMINISTRATOR

$55,833.86

The sum of 55,833 dol's 86 cts

CLOSE ACCOUNT 816-00-06400

REMITTER

02-13-91

THE OHIO SAVINGS BANK

DRAWER

BY

AUTHORIZED SIGNATURE

02-13-91

FEDERAL HOME LOAN BANK • NASHVILLE TENNESSEE

"833407" :064000910: 10010 157" 0305 "000558386"

OHIO DEPARTMENT OF TAXATION

ESTATE TAX

P.O. BOX 530, COLUMBUS, OHIO 43216

Date 2-12-91

To: OHIO SAVINGS
(NAME OF COMPANY WHOSE STOCKS OR BONDS ARE TO BE TRANSFERRED OR INSTITUTION WHERE DEPOSIT OR OTHER PROPERTY IS LOCATED)

The Tax Commissioner of Ohio consents to the immediate transfer of the following property now in your possession,

Control or custody:

To: William A. Hamann, Jr., Administrator

Description:

Acct. #816K00-06400 – $51,304.24 (6-1-89) plus interest

belonging to or standing in the name of joint name of JOAN E. POPP, deceased, late of Cuyahoga County, State of Ohio Date of Death January 30, 1991

JEAN A. FERRYMAN
TAX COMMISSIONER AGENT
BY:/s/ J.A. Ferryman
Tax Commissioner

SAVINGS ACCOUNT WITHDRAWAL
RECEIVED FROM
OHIO SAVINGS BANK

ACCOUNT NUMBER

816-00-06400

AMOUNT WITHDRAWN

55833.86
86
DOLLARS CENTS

SIGNED William A. Hamann Jr., Admr.

SIGNED DL #PM 680029

New
Address: Administrator

Check
Payable To: William A. Hamann,

Check No. 833407 /Cash
Transferred
To Account Number:

VALIDATION STAMP

[stamp] Remarks: DEATH CERTIFICATE APPOINTMENT PAPERS TAX RELEASE

SAV: 011 (REV 6/86)

PASSBOOK SAVINGS ACCOUNT

THIS CERTIFIES THAT Account No. 816 K 00 No. 06400
JOAN POPP

HAS OPENED A REGULAR SAVINGS DEPOSIT ACCOUNT WITH

OHIO SAVINGS BANK
CLEVELAND, OHIO

herein called the Bank. This passbook is issued and, by the acceptance hereof, is held subject to all the provisions of the laws of the State of Ohio, the Rules and Regulations of the Federal Savings and Loan Insurance Corporation, and the Articles of Incorporation, Constitution and By-Laws of the Bank, and to the rules contained in the Bank's Guide to Savings Accounts provided to the Accountholder at the time of opening this account, all as the same now exist or may hereafter be amended and is transferable only on the records of the Bank by the holder hereof in person, or by duly authorized attorney. Upon surrender of this passbook accompanied by a properly executed order to make said transfer. The Bank may treat the holder of record as the owner for all purposes without being affected by any notice to the contrary until this account is transferred on the books of the Bank.

Interest on deposits shall be paid as determined by the Board of Directors of the Bank and shall be subject to change without notice.

Deposits may be made through the mail by check, money order or registered letter. Always state account number. Do not send cash by mail.

All deposits are made subject to the Bank's policies on collection of checks or other items. For your protection and ours, when a check is accepted, a hold is placed on your account for the amount of checks presented for payment, in accordance with the Bank's Funds Availability Policy. Inquiries may be made at the branch in regard to information concerning the length of hold for a particular check transaction.

This book must be presented when money is deposited or withdrawn.

The owner of this account should notify the Bank of any change of address, name, or Taxpayer Identification Number.

Rev. 11/88

[seal]

ORGANIZED 1889

PASSBOOK SAVINGS ACCOUNT

THIS CERTIFIES THAT Account No. 816 K 00 No. 06400
JOAN POPP

HAS OPENED A REGULAR SAVINGS DEPOSIT ACCOUNT WITH

OHIO SAVINGS BANK
CLEVELAND, OHIO

herein called the Bank. This passbook is issued and, by the acceptance hereof, is held subject to all the provisions of the laws of the State of Ohio, the Rules and Regulations of the Federal Savings and Loan Insurance Corporation, and the Articles of Incorporation, Constitution and By-Laws of the Bank, and to the rules contained in the Bank's Guide to Savings Accounts provided to the Accountholder at the time

of opening this account, all as the same now exist or may hereafter be amended and is transferable only on the records of the Bank by the holder hereof in person, or by duly authorized attorney. Upon surrender of this passbook accompanied by a properly executed order to make said transfer. The Bank may treat the holder of record as the owner for all purposes without being affected by any notice to the contrary until this account is transferred on the books of the Bank.

Interest on deposits shall be paid as determined by the Board of Directors of the Bank and shall be subject to change without notice.

Deposits may be made through the mail by check, money order or registered letter. Always state account number. Do not send cash by mail.

All deposits are made subject to the Bank's policies on collection of checks or other items. For your protection and ours, when a check is accepted, a hold is placed on your account for the amount of checks presented for payment, in accordance with the Bank's Funds Availability Policy. Inquiries may be made at the branch in regard to information concerning the length of hold for a particular check transaction.

This book must be presented when money is deposited or withdrawn.

The owner of this account should notify the Bank of any change of address, name, or Taxpayer Identification Number.

Rev. 11/88

[seal]

ORGANIZED 1889

PASSBOOK SAVINGS ACCOUNT

THIS CERTIFIES THAT Account No. 816 K 00 No. 06400

WITHDRAWAL	DEPOSIT	DATE	BALANCE
160A	10525.33	JUN 1-89	10525.33
160A	40778.91	JUN 1-89	51304.24
1503.12	DEC31-89	INT 52807.36	
658.28	MAR31-90	INT 53465.64	
666.48	JUN30-90	INT 54132.12	
674.79	SEP30-90	INT 54806.91	
698.22	DEC31-90	INT 55505.13	
328.73	FEB13-91	INT 55833.86	
52A55833.86		FEB13-91	.00

CANCELLED ACCOUNT CLOSED

CANCELLED ACCOUNT CLOSED

THIS BOOK MUST BE PRESENTED WHEN MONEY IS DEPOSITED OR WITHDRAWN.

ORGANIZED 1889

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OF [sic] OHIO
EASTERN DIVISION

Ohio Savings Bank, Plaintiff, vs. TransOhio Savings Bank, and Estate of Virginia Pop [sic] Durma, and William A. Hamann, Jr., and Marvin Schatz, Defendants.	:	Case No 1:92CV2025

DEPOSITION OF WILLIAM A. HAMANN, JR., a Defendant herein, called by the Plaintiff as upon cross-examination under the statute, taken before me, A. Ann Manning, Notary Public in and for the State of Ohio, by agreement of counsel, at the Marion Correctional Institution, in the Office of O. H. Wood, III, Assistant Deputy Warden, Marion-Williamsport Road, Marion, Ohio, 43302 on Friday, May 28, 1993, beginning at 10:55 a.m. and concluding at 3:39 p.m.

APPEARANCES

FOR THE PLAINTIFF:	Roy E. Lachman Assistant General Counsel 200 Ohio Savings Plaza 1801 East Ninth Street Cleveland, Ohio 44114
FOR THE DEFENDANT R.T.C., RECEIVER FOR TRANSOHIO SAVINGS BANK:	W. Eric Baisden Attorney at Law Brouse & McDowell 500 First National Tower Akron, Ohio 44308-1471
FOR THE DEFENDANT ESTATE OF VIRGINIA POPP DURMA:	Hugh A. Carlin Attorney at Law Lakewood Center North 14600 Detroit Avenue Suite 1030 Lakewood, Ohio 44107
FOR THE DEFENDANT MARVIN SCHATZ:	George Stuhldreher Attorney at Law Gallagher, Sharp, Fulton Sixth Floor, Bulkley Building Cleveland, Ohio 44115

[p. 3] STIPULATIONS

It is stipulated by and between counsel for the respective parties that the deposition of WILLIAM A. HAMANN, JR., a Defendant, called by the Plaintiff as upon cross-examination, pursuant to the Rules of Civil Procedure, may be taken at this time by A. Ann Manning, Notary Public in and for the State of Ohio, by agreement of counsel and without Notice of other legal formality; that said deposition may be reduced to writing in stenotypy by the Notary Public, whose notes may thereafter

be transcribed out of the presence of the witness; that proof of the official character and qualifications of the Notary Public is waived; and that the examination, reading and signature of the said WILLIAM A. HAMANN, JR. to the transcript of his deposition is expressly waived by the witness; said deposition to have the same force and effect as though signed by the said WILLIAM A. HAMANN, JR.

* * *

[p. 124] A That is, that is correct.

Q When you handle estates for other people and met other fiduciaries, did you ever meet other people that acted similar to the way Mrs. Durma acted?

A Yeah.

Q In being cautious or guarded in her handlings with the attorney?

A Yes. Because most people are not – don't deal with this on a, on a routine basis and they don't know what they are up against and there's unfortunately an inbred distrust of lawyers and, uh, so, yeah. More people than not are somewhat cautious and guarded.

Q So you didn't think that her actions were anything out of the unusual? I mean you had seen this before, right?

A Yes, I had.

Q Mr. Hamann, handing to you what's been marked Plaintiff's Exhibit T, that's the forged letter of appointment of the Joan Pop [sic] Estate.

A Yes.

Q Okay. And directing your attention to February 13th, 1991, the date that you went to Ohio Savings Bank with the Joan Pop [sic] assets book.

A Yes.

Q Do you recall if Ohio Savings Bank personnel that [p. 125] day, upon you presenting this document to them, Plaintiff's Exhibit T, calling the Probate Court to verify if that was a valid estate number, if that estate had, in fact, been opened and if you were the duly qualified acting administrator of the Pop [sic] Estate?

A I do not believe that such a call was made.

Q Mr. Hamann, do you recall Ohio Savings Bank personnel on that date ever questioning you about the fact that the Probate Court seal was not clearly evidenced on the Plaintiff's Exhibit T?

A Somebody questioned me about a seal. Whether it was Ohio Savings, – in fact, um, if that's the document I remember going with a pencil, I believe, over a certificate at one of the banks. That may be. I don't remember specifically but, if there was a question, I remember taking a pencil and saying, "Look. This is raised," and shading it somehow. Other than that, I, I don't recall.

Q Was that when you were at Ohio Savings Bank?

A It may have been.

Q And you told us under prior questions of Mr. Lachman that, and I know we don't have a Plaintiff's Exhibit T copy that's showing about the seal, but you

recall when you prepared this forged document that it was in the general area of where the "John" is in the signature of John Donnelly and by the three lines of the "County" and [p. 126] "by", the word "by", b-y, near the bottom?

A (Nods head affirmatively)

Q And you recall quite clearly the words "Probate Court" did not appear on the seal that you used?

A They absolutely did not appear on the seal that I used.

[Q As you told us, you used a notarial public seal with the "notarial public" to show up, you used tape over that. On the seal what did show up was the State of Ohio and part of the seal of the Great State of Ohio?

A Correct.

Q On that date, February 13th, 1991, did Ohio Savings Bank personnel with regard to the Pop [sic] Estate question you about Plaintiff's Exhibit V, the tax release? You recall Plaintiff's Exhibit V is the tax release?

A Yes, I do recall the Exhibit and I do not recall any question about the tax release.

Q They never asked you any questions that would lead you to believe that they thought there was something unusual about this?

A No.

Q Do you recall what the original of Plaintiff's Exhibit V looked like concerning the tax commissioner's stamp?

A Well, it looked exactly like your copy there with [p. 127] the exception that, um, I believe the signature was in blue. Um, and there was no stamp. That was a typed signature block.

Q And normally when a tax release is properly issued by the tax commissioner, there's like a pre-printed ink stamp that appears near the bottom of the signature?

A That's right.

Q You recall seeing that on hundreds of tax releases, don't you?

A On every one that I did.

Q However on Plaintiff's Exhibit V, that inked tax commissioner's pre-printed stamp did not appear; is that correct?

A That's correct.

Q And Ohio Savings Bank personnel never questioned you that that ink stamp was missing from this tax release, Plaintiff's Exhibit V; isn't that correct?

A That's right. Now, let me clarify just one statement that may have been a partial misstatement. Every tax release that was issued by Cuyahoga County had the stamp on it. Tax releases that came directly from Columbus, which some did, and tax releases which came from other counties sometimes had just a signature or the typed name under or a signature with a typed name over. Not all counties used the stamp and the State of Ohio tax, uh, [p. 128] Department of Taxation down in Columbus which, on occasion, would issue a tax release on certain type of asset would not yield a stamp but all Cuyahoga

County releases that were issued from the Cuyahoga County department used the stamp.

Q And Joan Pop [sic] died a resident of Cuyahoga County, Ohio; is that correct?

A Correct.

Q And, in fact, even on Plaintiff's Exhibit V it even states:

> "Belonging to or standing in the name or joint name of Joan E. Pop [sic], Deceased, late of Cuyahoga County, State of Ohio, date of death January 30th, 1991."

Referring to the Plaintiff's Exhibit V. Therefore, the tax commissioner's printed stamp would have appeared on this tax release since she died in Cuyahoga County, Ohio; is that correct?

MR. LACHMAN: Objection.

A In my experience on every Cuyahoga County tax release that I ever got in, in 20 years had the stamp.

Q And the Ohio Savings Bank person on that day, February 13th, never questioned you that the stamp was not on this tax release, Plaintiff's Exhibit V?

A No.]

[p. 129] Q Referring you back to Plaintiff's Exhibit T, the forged certified letter of appointment, with the same date reference and the reference to the Pop [sic] Estate, did Ohio Savings Bank personnel ever question you that the certified letter of appointment starts off, "I, Francies [sic] J. Talty, Judge of the Probate Court," however –

A (Nods head affirmatively)

Q – the certified letter is signed "John J. Donnelly, Probate Judge, by" – I can't recall the signature.

A I can't either.

Q Do you remember whose name you put on there as the clerk?

A I don't – I'm not sure there is even a clerk by that name.

Q Looks like an M. M. Meyer, deputy clerk.

A Sounds reasonable.

Q Did Ohio Savings Bank personnel on February 13th, 1991, regarding the Pop [sic] Estate in Plaintiff's Exhibit T, ever question you that the printed name of Francis J. Talty in the first line is not the person who signed or had deputy clerk authorization signature of signing Talty's name but, in fact, John J. Donnelly's name is signed at the end?

A No.

* * *

APPENDIX 8

COPY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO SAVINGS BANK	)	CASE NO: 1:92 CV 2025
Plaintiff,	)	JUDGE BATTISTI
v.	)	MAGISTRATE STREEPY
TRANSOHIO SAVINGS BANK, et al.,	)	
Defendants.	)	

DEFENDANT, RESOLUTION TRUST CORPORATION'S BRIEF IN RESPONSE TO OHIO SAVINGS BANK'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO OHIO SAVINGS BANK'S BRIEF IN OPPOSITION TO RESOLUTION TRUST CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Mary K. Whitmer
Supreme Court Reg. #0018213
Robert M. Stefancin
Supreme Court Reg. #0047184
W. Eric Baisden
Supreme Court Reg. #0055763
BROUSE & McDOWELL
500 First National Tower
Akron, OH 44308-1471
(216) 535-5711

Attorneys for Defendant,
Resolution Trust Corporation,
in its capacity as Receiver for
Transohio Savings Bank

I. INTRODUCTION

Whenever the Association is informed of a deceased account holder, it is their responsibility to flag the signature card on each and every account in that customer's name.

In addition to placing flags on the signature cards, the terminal hold message number "04", "DEATH NOTICE", must be entered in the terminal. Refer to the Olivetti Manual for terminal entry procedure.

The following sections are to aid in the often complicated handling of decedent accounts.

II. LEGAL DOCUMENTS REQUIRED

There are a number of legal documents required in the handling of decedent accounts. The following sections on "Procedures for Handling Each Type of Account by Ownership" must be referred to for specifics as to which documents are required. The purpose of this section is to merely provide samples of documents which may be required, and give some background knowledge as to their use.

A. Tax Release

If the Association has been advised of the death of a savings account owner, extreme care should be exercised with regard to the account from the moment of death notification to the actual disbursement of funds. The Ohio revised code 5731.39 provides in pertinent part:

"No . . . financial institution . . . having in possession, control or custody, a deposit standing in the name of a decedent, or in trust for a decedent, or in the name of a decedent and another person or persons, shall deliver or transfer an amount in excess of three-fourths (3/4's) of the total value of

such deposits, including accrued interest and dividends, as of the date of the decedent's death, without the written consent of the Ohio Tax Commission. The written consent of the Tax Commission need not be obtained prior to the delivery or transfer of amounts having the value three-fourths (3/4's) or less of said total value."

In other words, you must not permit a withdrawal of more than three-fourths (3/4's) of the balance of the savings account held in the name of a deceased account holder without first receiving a tax release properly signed by an agent of the Ohio Tax Commissioner.

In the event that three-fourths (3/4's) of the funds are withdrawn from an account without a tax release, the signature card should be flagged with the information that there is a hold on the remaining one-fourth (1/4) of the balance of the account pending receipt of the tax release. There are two exceptions to the requirement of a tax release. A tax release is not required if:

1. The account owner was not a *permanent resident* of the State of Ohio at the time of death.

2. If the account balance at the time of death is *less* than $500.00.

Following is a sample of a tax release.

B. Order Relieving the State from Administration

In accordance with the statutes as set forth by the State of Ohio, the assets of a decedent's Estate may be released without administration provided the assets totally do not exceed $15,000.00.

The next of kin, or heirs, of the decedent must file with Probate Court for an Application for Release

of Assets Without Administration. This release will set forth the name of the decedent, the date of the original application, and the date the matter came to be heard by the probate judge; it will name the person or persons to whom particular assets are to be paid. It will also list the debts against the estate, as well as the amount of money to be released. The funds in the account shall be paid to the person or persons named in the order for release of assets upon presentation of this document, together with proper identification of the person named as the recipient of the assets, a properly executed withdrawal ticket, a Tax Release, and the savings passbook. It is not necessary to obtain a copy of the Letters of Appointment, since none would be issued in the case.

The funds in the account must be paid in check form only, payable to the person or persons named in the order. Obtain a copy of the order (the court issues an order for each asset mentioned) for the permanent records of the Association. Note on the withdrawal ticket the fact that the withdrawal was made pursuant to such an order.

The following is a sample of an Order Relieving the Estate from Administration:

III. CONVERTING, TRANSFERRING, AND CLOSING PROCEDURES FOR DECEDENT ACCOUNTS

REFER TO SECTION ON "PROCEDURES FOR HANDLING EACH TYPE OF ACCOUNT OWNERSHIP" FOR PROPER USE OF THESE PROCEDURES.

A. Closing or Transferring a Decedent Account

When the Executor, Administrator, survivor, or properly authorized person presents the proper

documents, a decedent account may be closed by the following procedures.

1. Note on the signature card that the owner is deceased and the date.

2. Have the Executor, Administrator, survivor or properly authorized person complete a withdrawal ticket.

3. Attach required documents to the withdrawal ticket.

4. Proceed to close the account.

[5. In the case of an Estate Account, the check *must* be made payable to "The Estate of (deceased account owner)" or to "John Smith, Executor of the Estate of (deceased account owner)".]

If the surviving owner is closing the account, he may have the funds in any form he wishes.

In the case of a Successor Trustee, Guardian, Custodian or Fiduciary, the check must be made payable to the Successor.

REFER TO SPECIFIC TYPE OF OWNERSHIP FOR DETAILS.

6. An account may be transferred to a new account, in any form of ownership, after completing the above. If a check is required for close-out, simply have the customer endorse the check and open the new account.

* * *